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In the Supreme Court of the United States

OCTOBER TERM, 1963.

No. 447.

UNITED MINE WORKERS OF AMERICA,

Petitioner,

vs.

SUNFIRE COAL COMPANY, a Corporation, and ASHLO COAL COMPANY, a Corporation,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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SUNFIRE COAL COMPANY, a Corporation, and ASHLO COAL COMPANY, a Corporation,

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Respondents Sunfire Coal Company and Ashlo Coal Company in opposition to the petition for writ of certiorari filed herein, respectfully represent:

QUESTIONS PRESENTED.

1.

Was the evidence in this case (a) sufficient to support a finding that the Union had engaged in a secondary boycott and (b) sufficient to support a judgment that the Union was liable for the damages of which the plaintiffs complained?

2.

Did the petitioner comply with Rules 51 and 49(a) of the Federal Rules of Civil Procedure in such manner as to preserve its right to complain of instructions given, or refused to be given, or interrogatories submitted by the trial court to the jury, and if so, were there such material errors in the trial court's instructions or interrogatories as to justify the granting of a Writ of Certiorari?

3.

Whether, under the evidence, the appellate court correctly appraised Sunfire Coal Company as a person who is permitted to maintain an action as a plaintiff under Section 303 of the Labor-Management Relations Act, 1947?

4.

In an action under Section 303, Labor-Management Relations Act of 1947, against a labor union for damages claimed to have resulted from a labor dispute wherein plaintiffs contended that certain tactics of defendant constituted violations of Section 303 by the union and that the union's entire course of conduct during the dispute also constituted unlawful interference with plaintiffs' businesses violative of state common law, did the district court have jurisdiction to determine liability under the common law or non-federal grounds asserted in support of the single cause of action?

STATEMENT OF THE CASE.

The Evidence.

Because they consider the petitioner's resumé of facts to be argumentative and euphemistic, respondents feel justified in correcting inaccuracies and omissions by a recital of facts considering the evidence most favorable to them.*

When amendments to the National Bituminous Coal Wage Agreement were negotiated in 1958, the respondents took no part in the negotiations, nor did they have any opportunity to negotiate a contract of their own (4b, 36a).** After the negotiation of the amended contract, United Mine Workers of America (hereinafter called UMW), through its various districts, in January, 1959 sent contract termination notices to former operator signatories, advising that the old contract was being cancelled, and offering to negotiate a new contract (223a, 229a-230a, 298a). Since neither had been a signatory to the old agreement, neither of the respondents received the quoted notice of cancellation (3b). As for the insincere offer to negotiate a new contract, it was made clear that, after December 1, 1958, the time for negotiation was past (36a, 132a). Significant among the negotiated amendments in this new "one contract" was a covenant to the effect, as

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* A principle sanctioned in *Taylor v. Mississippi*, 319 U. S. 583; *McFall v. Tooke*, 308 F. 2d 617, 619.

** Numeral followed by the small letter "b" refers to the page of the appendix filed in the Court of Appeals by the respondents (plaintiffs-appellees), and here certified upon appeal. Numeral followed by the small letter "a" refers to the page of the appendix filed in the Court of Appeals by the petitioner (defendant-appellant) and here certified upon appeal. The capital letter "A," followed by numeral refers to the page of the appendix bound with the petition for writ of certiorari, filed herein by the petitioner (who was defendant-appellant in the Court of Appeals).

a practical matter, that operator-signatories would not do business with other operators unless they were also signatories (16b).

Carson Hibbetts had been president of District 28, and stationed in Norton, Virginia (218a). On March 1, 1959, the International Union dispatched him to Kentucky to become president of "provisional" District 30, a seven-county area in Southeastern Kentucky (219a-220a). To persuade operators to sign the new contract, Mr. Hibbetts promptly set up the outline of a program to start picketing (223a). To promote this program, Mr. Hibbetts was authorized by the petitioner to "use his staff in District 30" (14b). This he did, delegating to field workers Matt Combs and Bill Perkins authority to work directly with the pickets (224a).

Pursuant to plans previously discussed in union meetings called by Mr. Hibbetts, on the morning of March 16, 1959, a large group of men met at Combs, within a few hundred yards of the Sunfire tipple (299a). It was estimated that this assemblage numbered 1500 to 1800 (176a), and when they started on a tour of the coal fields they comprised 250 to 300 carloads (106a). They were so numerous and traffic was so congested that Ashlo's manager spent two hours driving three miles in a futile attempt to reach the tipple (26a). When he finally did reach the property, much later in the day, he found pickets "all over the place," and when he was spotted by Bill Perkins, who was in a carload of pickets, Perkins "started hollering; so that whole carload of fellows started hollering and jeering at me, but I didn't pay any attention" (26a-27a).

After this massive group had assembled at Combs and heard an address from their leader, they decided they "would go through the field and see how many mines and so forth were working," so the caravan proceeded through-

out the field, into adjoining Letcher County, and returned to Combs for dispersal about three o'clock in the afternoon (299a). This program continued for some three to five days (108a). According to police observers, pickets numbering in the hundreds made a practice of visiting tipples and loading ramps similar to that of respondents, at which an average of three to five men were employed (109a). As a result of these visits in such numbers, the visited ramps usually closed down their operations (108a). Producing mines apparently were ignored by the pickets (109a), although presumably the primary objective of the campaign (229a, 299a).

After some three to five days mass convoys were discontinued, and petitioner adopted a policy of having pickets meet at a designated point early in the morning, receive their instructions from their leaders, and then separate into various groups which proceeded separately to ramps and tipples in the area (106a-108a). The chief and customary official guiding these movements was Bill Perkins, although Matt Combs was also "occasionally" there (107a). Perkins was frequently present when disorders were in progress, offered little cooperation to police, and demonstrated his control over the groups by dispersing them whenever it suited him to do so (27a, 89a, 111a-114a, 152a, 158a, 159a, 169a, 170a, 216a-218a).

Having separated at their morning meeting place, the various picketing groups, numbering up to 50 or 60 men, proceeded to various tipples, at which places they took their stand, sought to prevent truckers from delivering coal (29a, 33a, 61a, 65a, 67a, 71a-73a, 77a, 88a, 90a, 93a, 96a, 101a, 102a, 171a, 174a-177a, 212a), picketed railway switches and induced railroad crews to desert their trains (28a, 33a, 60a, 67a, 114a, 141a, 142a, 144a, 145a, 147a-149a), and threatened those who incurred their displeasure

(59a, 60a, 72a, 89a-91a, 96a, 102a, 172a, 173a, 178a, 183a, 185a).

Groups of varying numbers were at or in the vicinity of respondents' premises day and night (3b). For approximately a month (23b), these pickets were stationed at the mouth of the access road leading from the main public highway to respondents' tipple, a distance of approximately one-fourth mile (302a). Here they conducted themselves as described above and vilified truck drivers (59a, 72a, 88a, 96a, 177a, 178a, 186a), threw rocks at and into trucks (56a, 67a, 101a, 153a 168a), and engaged in altercations with State Police who were trying to maintain order (112a, 113a, 151a, 152a, 158a, 167a, 168a). About early or mid-April, the pickets were moved from the mouth of the respondents' access road across and to the opposite end of the bridge where another rural road entered the highway, and their picketing activities were continued at that point (23b, 302a-303a).

Numerous truck drivers and others testified that they were "afraid" to carry on their regular duties (71a, 77a, 96a, 170a, 175a, 212a).

Among the pickets who were regularly at Combs, vociferous, and most active were James Morris, Jasper (or Lonnie) Wright, and Clinton Bryant (59a, 64a, 72a, 73a, 89a, 95a, 100a, 173a, 183a, 185a). Also present at Combs on numerous rowdy and menacing occasions was Bill Perkins (27a, 89a, 112a, 152a, 158a, 169a, 216a), and on some occasions one Walter Turner, who threatened a trucker by saying that every man hauling coal would be shot "out of the hills or anyway, that the bushes was green" (89a-90a). The two men to whom Matt Combs or Bill Perkins delegated authority for being responsible for picketing activities at Combs were there with regularity, according to Combs (309a).

On the morning of March 16, Kelly Caldwell who operated the tipple for Ashlo and was not a member of the union, started to work and found a large group of men assembled near the tipple. He talked to Bill Perkins, and asked if he could "do some dead work down there" to which Perkins said "No." Perkins declared to him "there would be no work done until the contract was signed." He did not try to work because he was afraid to (170a).

Because of the confusion and potential danger, respondents made no effort to operate from March 16, to March 28 (28a, 29a, 65a).

On March 30, the employees reported for duty, but were afraid to work or handle coal brought in by truckers, so the tipple was operated that day by such men as could be hired (29a-30a). At this point, some of respondents' employees joined the pickets, explaining that if the union had anything to give away, they wanted to get their share (29a-31a). When operations were begun on March 30, some 150 pickets gathered and four of their number (Oscar Smith, Lonnie Wright, Clinton Bryant and Glenn Caldwell) invaded the tipple, let the crew know that the pickets "didn't like" them working (22b), told them to get off the tipple (185a, 297a), and pushed and herded them off "like a bunch of sheep" (183a). On the following day, pickets numbered from 50 to 300 and "they made a push to come back down on the tipple on us, and there was enough State Policemen got in front of them to stop them" (31a). The respondents' properties "were dynamited about three different times" (32a-33a).

Harassment and intimidation, both of the employees of the respondents and others, continued with increasing intensity. Employees of coal producers were cursed and threatened by the pickets (72a, 96a), and having reached the tipple with trucks, were afraid to come out alone, and

spent several hours waiting to form a group large enough for safety (72a, 77a). Recognized in the picketing crowd were Jim Morris and Lonnie Wright (72a, 95a). Truckers who undertook to remove nails strewn in the access road were threatened by Morris and Wright, Morris having a pistol in a pocket at the time (75a, 76a, 95a, 97a, 98a). Wright's father, a Tennessean, declared they "turned trucks over" where he came from (95a).

Another truck operator said that he and his employees were "finally stopped" because "there was pickets there every day and they finally dynamited the tipple first, and then finally somebody burned it up." Asked how the pickets affected trucking, he said "they interfered with it, blocked the highway, the entrance, going and coming," called the truckers vile names, and "they threatened to drag you out of the truck and kill you" (88a-89a). Among pickets regularly on such scenes were Morris, Lonnie Wright, and Bill Perkins, the last said to be there "near every time" that the trucker "went down there." Perkins was "around the crowd" that was threatening and calling the names (89a). Walter Turner was also a regular among these pickets, and he declared "they was going to kill every fellow that hauled if they didn't quit hauling" (89a-90a). One truck driving employee declared that, because of the pickets, "a lot of days I was afraid to go out and in" (96a). To this same trucker, James Morris (5b) declared that rather than work during the strike he "would steal first," to which the trucker laconically responded "I won't" (97a).

Another trucker, who arrived late one evening, had to leave his truck unattended, came back to find his tires slashed "from side to side with a knife," and part of his coal spilled out. Pickets who had been standing nearby but who had disappeared when he returned included Lon-

nie Wright (100a). Going out, he was rocked (101a). When he came back the next day with the same load of coal, some 200 to 300 pickets had gathered; one jumped on his truck and tried to drag him out while others encouraged and "hollered and told him to drag that son-of-a-bitch out." This effort was unsuccessful because his door was locked and the police got him through (101a-102a).

One of the respondents' employees, attempting to go home from work in a truck with a coal hauler, was intercepted by two carloads of pickets, vilified and intimidated. Among this group were the ubiquitous Lonnie Wright and James Morris (59a). The occupants of the pickets' cars were among the same persons who had been on the picket line near the tipple (60a). He said that the pickets told the employees that if they did not close the tipple down, they "wouldn't get no coal to run the tipple on" (61a).

Charles Edward Campbell who hauled coal for Royal Coal Company, was frequently cursed by the pickets around Combs in general, and Jim Morris cursed him and threatened "I'll get you" (172a-173a).

On another occasion, it was necessary to rescue truck drivers who were being pursued by pickets cursing threats and epithets so loud that they could be heard across the river (178a).

The railroad had similar trouble. Its Sergeant of Police testified of difficulties because "They was picketing our switches." These ranged from small groups up to numbers as large as 50 or 60 (141a). The pickets would station themselves at the switches leading into various coal tipples, and the regular train crew "would get off" so "officials would have to go on and take charge" (141a-142a). These pickets identified themselves by placards as representing UMW (143a). The railroad's traveling en-

gineer said "When the [railroad] employees would not cross the picket lines, we would go in there and place empties and pull loads for the various mines" (144a). This is the same witness who is quoted as saying the railroads rendered the "same service" during the strike as before. Actually, he was asked whether supervisory personnel were "able to render the same service to the mines and tipples as had been rendered before the strike," to which he responded "Yes sir, they were capable men." In the very next two questions, he stated he was unable to say whether or not they were able to furnish cars as promptly or in as regular supply (145a-146a).

Despite the inference of petitioner to the contrary, it clearly appeared that respondents' interference with railroad service *did* impede the business of respondents (28a, 48a, 60a, 67a). At Combs, this official and his associates were subjected to such rough treatment that he says "after we got through this crowd there at Combs my crew quit on me" (145a-146a), although he was able thereafter to persuade them to finish the day's work by promising police help (146a). Another Sergeant of Police for the railroad, along with his crew, found a log on the railroad track, and when they started to move it, were warned by UMW pickets that "if we moved that log there would be plenty of bloodshed" (147a).

Out of disorders, intimidation and violence such as is above described grew (1) an increase of State Police personnel from a normal contingent of 11 men to a total of 125 additional men (105a-106a), (2) an injunction against the petitioner procured by the Regional Director of the National Labor Relations Board (239a-241a), (3) an injunction against the petitioner procured by the Louisville & Nashville Railroad Company (8b-9b), and finally (4) a Governor's order sending the National Guard into the area (114a).

However, before ordering the guard into Southeastern Kentucky, the Governor exerted extreme effort to restore order by other means. Conferences between coal operators and union officials were called and held at Frankfort upon the Governor's request (131a). Out of the first such conference grew agreements to hold a conference in Washington between coal operators and top union officials (131a). The union was represented by its Vice President, Mr. Thomas Kennedy, its assistant to the President, Mr. Tony Boyle, and its Secretary-Treasurer, Mr. John Owens (47a, 130a). At this conference the operators contended that the small mine producer would find it economically impossible to comply with the Wage Agreement as amended, and sought a more lenient contract. The union officials stated that they could enter into but "one contract" (132a), the National Agreement as amended. After this impasse the union officials were asked what could be done to stop the violence and were curtly told by Mr. Kennedy or Mr. Owens, to "sign the contract" (127a, 130a, 135a). Mr. Boyle attended a subsequent meeting at Frankfort, asserting that he had the same authority as John L. Lewis. Mr. Boyle was addressed by Mr. Vego Barnes, the moderator appointed by the Governor, and was asked what could be done to halt the violence and property damage in Southeastern Kentucky. Mr. Boyle indicated that the violence could be stopped by signing the contract (47a, 128a, 131a, 135a).

On April 24, an extremely large number of pickets (estimated by Ash.'s manager as "a thousand"—35a) gathered at Combs, led by Bill Perkins. They blocked the highways and were described as "out of hand". (112a). The Sergeant of State Police called upon Perkins to restore order, but got small response (112a-113a). Someone called that the pickets were "rushing the tipple," and

a number of armed police went down to the access road running under the bridge and intercepted the group (158a). "After quite a bit of talking" it was agreed that a few of the pickets go over to the tipple with a police officer and talk to the officials, which they did without results (35a-37a, 112a, 158a). Something like an hour after the unruly group began gathering at Combs, and after they had been thwarted by the police, they dispersed upon the order of Mr. Perkins (112a-113a). However, before they dispersed, an approaching truck driver heard a picket yell, "Go ahead and let him dump, he won't be hauling there long" (96a).

Wiley Strong, a picket who had been regularly on duty, talked to Mr. Perkins shortly before the group disbanded, and Perkins told him that "we wouldn't have to picket down there any more, that they would take care of it" (216a-217a). Counsel for petitioner was of the impression that Mr. Perkins meant to imply that outside pickets would no longer be necessary, but that local pickets would take over the duties, but Mr. Strong made it clear that this was not what Perkins said. On the contrary, he is quoted as telling Strong that they would "Take care of the mine" (218a).

As prophesied, and suggested by pickets even earlier (168a), the tipple burned the next morning shortly after daylight. Water tanks, filled the night before, had been drained (34a).

Mrs. Ruby Baker, a friend of the family of James Morris, testified that on the evening before the Sunfire tipple was burned Morris brought his family to her home, where they stayed all night, but that Morris left and did not return until the next morning (203a-204a). She said that when Morris returned early the next morning, he was dirty, came running through the house, and told her

to go out and get a gun out of his car, and upon his indication as to where it was hidden under the seat, she got out a high powered rifle and brought it into her house and hid it under a mattress (204a-205a). After she had hidden the gun, Morris said he would "guarantee the tipple to go down" and told her and the members of his family to get ready "and we would go down and watch it burn down." With that, the group went to the vicinity of the tipple and saw that it was on fire (205a). Upon reaching the tipple area, Morris left his family with Mrs. Baker, but at some later time came back to her house and got his gun (205a-206a).

According to the guards who were on duty the night before the tipple burned, there was considerable shooting in the direction of the tipple, some of the shooting coming from the direction of the pickets, and some of the bullets hitting the tipple and a nearby building (188a, 189a, 196a, 198a). Also, at some time during that night, there was a "right smart" of dynamiting across the river in the vicinity of the highway (189a).

Trooper John Hill was stationed near the bridge on the morning the fire started (162a). He actually saw the fire start, but before it started he observed "a man running from the area of the left side, my left side, of the tipple." This man went "up a draw just beyond the tipple and up on the mountain out of sight." Hill said the fire started "within fifteen minutes" after he saw the man run up into the mountain (162a).

Police Detective Walter Wood investigated the burning of the tipple, starting at a time when the fire was still burning (163a). He found foot prints behind the tipple, followed the trail with bloodhounds, found where a "person or persons had been sitting," discovered at least two persons' tracks which were followed to a footbridge some

miles away, where the persons apparently got in a car (164a). This car had come back toward Combs (165a). Mr. Wood made it clear that the person or persons so tracked had proceeded in a direction away from the State Police who were stationed at the bridge, and in the opposite direction from that traveled by guards leaving the tipple that morning (6b).

On the relative location of involved and implicated persons, it should be pointed out that James Morris and Lonnie Wright lived on company property near the tipple (79a), and roofing nails strewn in the road just in front of Wright's house (74a) were located on the private access road about 250 yards from the ramp (94a).

As a part of the overall picture leading up to the destruction of the Sunfire tipple, it was also shown that a substantial number of other coal operators, during this period described as "extraordinary" by the Sergeant of the State Police (109a), suffered extensive and sometimes repeated property damage in the form of fires and explosions which damaged or destroyed their mining equipment or tipple facilities (122a, 124a, 125a, 126a, 130a, 134a, 138a, 139a, 140a). These misfortunes were usually preceded by picketing at operators' plants on the part of petitioner's adherents (122a, 126a, 130a, 134a, 138a, 139a, 140a)

SUMMARY OF ARGUMENT.

1.

This Court should not be expected to review voluminous evidence which is conflicting, susceptible of widely varying interpretation, and supported by the verdict of a jury and the judgment of two courts below. Neither is it likely that the Court has failed to comprehend a contention which has been presented to it on four previous occasions in recent months. Nevertheless, should the Court see fit to examine and weigh the evidence in this case, it will be seen that the evidence fully supports a judgment of union responsibility for damages inflicted in violation of Section 303, Labor Management Relations Act, 1947, and in violation of state common law.

2.

The petitioner failed to comply with Rules 51 and 49(a), Federal Rules of Civil Procedure, in such manner as to preserve its right to complain as to the instructions given, the interrogatories submitted, and the instructions refused, by the trial court, and the specific grounds which it now offers for the first time, in claiming error on the part of the trial court, come too late. However, had proper objection been taken, the charge of the trial court to the jury was, as found by the Court of Appeals, "without prejudicial error" (A5). The interrogatories and instructions must be read as a whole from the point of view of the impression they would seem to convey to a jury of laymen, and not in their individual parts. When this test is applied to the charge of the trial court, it is at once apparent that the jury of laymen were told, in language they could understand, the factors involved in this action for damages for the wrongful interference by the petitioner with the businesses

and property of the respondents, both as to the federal ground and as to the common law ground.

3.

Sunfire Coal Company, being an employer with employees and one of the companies which the petitioner was trying to get to sign its new collective bargaining contract, being directly injured by the activities of the petitioner, and being the owner of the property destroyed and damaged by the petitioner, was entitled to maintain an action for damages under Section 303 of the Act, and the lower courts correctly so held. Should a conflict between two opinions in the same circuit be a ground for granting certiorari, the opinion in the Sixth Circuit's *Osborne* case (279 F. 2d 716), referred to by the petitioner, and its opinion in this case are entirely consistent.

4.

Petitioner's attack on the applicability of the doctrine of ancillary or pendent jurisdiction in a case involving an alleged violation of Section 303, Labor Management Relations Act, has been unsuccessfully urged by it in four recent, prior decisions of the Court of Appeals for the Sixth Circuit, in each of which certiorari has been denied. The fact that the common law ground, if tried alone as an independent cause of action in the State court, would have taken the procedural form of a class suit, rather than a suit against a jural entity, does not affect the applicability of this doctrine. The contention that its applicability is affected by the principle of federal preemption has been twice rejected by this Court in cases where the union's activity was marked with violence and intimidation, as is the case here.

THE ARGUMENT.

QUESTION NO. 1.

(a)

Should the Court see fit to review the evidence in this case, that evidence will demonstrate there is justification for a determination that the Union had engaged in a secondary boycott.

In presenting its argument that it did not engage in a secondary boycot, petitioner has framed its Question Presented in such way as to avoid an indication that review of the evidence will be necessary. Despite this, the evidence on the subject is conflicting and is susceptible of widely differing interpretations, in consequence of which a review of that evidence would be necessary to properly resolve the question. Such is not the usual task of this Court. Except where there is some important and impelling reason for so doing, reviewing evidence is not the customary or proper function of this Court.* On various occasions individual members of this Court have expressed reservations about dissipating the time and energy of the Court in weighing evidence that has been subjected to the scrutiny of two courts below.**

Petitioner is here saying that a trial-court finding of activity proscribed by Section 303, Labor-Management Relations Act, 1947, was error, and not supported by the evidence produced. Specifically, petitioner declares that the finding "squarely conflicts with principles and criteria

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* *Houston Oil Co. of Texas, et al., vs. Goodrich, et al.*, 245 U. S. 440; *United States vs. Johnston*, 268 U. S. 220.

** *New York, New Haven & Hartford Railroad Co. v. Henagan*, 364 U. S. 441; *Sentilles v. Inter-Caribbean Shipping Corporation*, 361 U. S. 107; *Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500, 518; *Carter v. Atlanta & St. A. B. R. Co.*, 338 U. S. 430, 437; *Wilkerson v. McCarthy*, 336 U. S. 53, 64.

enunciated by this Court's *Local 761, Int. Union of Elec. Workers, vs. NLRB*, 366 U. S. 667."

This is the fifth time that this precise argument supported by this precise citation of authority has been urged upon the Court by this same petitioner. It was presented in a petition for Writ of Certiorari addressed by this petitioner to the Court in *Gilchrist vs. United Mine Workers of America*, 6 Cir., 290 F. 2d 36, cert. den., 368 U. S. 875. It was repeated in a Reply Brief filed by petitioner in the same action. It was presented again by this petitioner in its petition for Writ of Certiorari addressed to this Court in *Flame Coal Company, et al. vs. United Mine Workers of America*, 6 Cir., 303 F. 2d 39, cert. den. 371 U. S. 891. Once more the petitioner directed the Court's attention to it in the Reply Brief filed in the *Flame* case.

While it may be conceded that "there is an absence of precedential value in the denial of certiorari", it is unlikely that this Court has failed to grasp the significance of or properly evaluate a contention so frequently presented.

As indicated in the previous cases, *supra*, neither the adverse litigant, either of the trial courts, or the Court of Appeals agrees with this petitioner's interpretation of *Local 761*. The factual setting in that case, in respondents' opinion, is not faintly comparable to the facts which gave rise to this litigation. In *Local 761*, there was traditional *peaceful picketing* at one of five entrances to a plant, which particular entrance had been set aside for use by employees of independent contractors. The union in that case had a controversy with a single employer: General Electric. It had a single objective: the satisfactory settlement of twenty-four grievances. It was not concerned with other employers, and was not seeking any concessions, benefits or contracts from other employers.

The situation in this case was entirely dissimilar. Here, by its own admission, the Union had at least 176

targets (employers) in its campaign to procure signatories to its then-negotiated contract. It is inferred that these 176 were *all* of its targets, for it is argued that, since there was no showing that any of the 176 were delivering coal to Ashlo, the object of picketing at the Ashlo tipple could not have been designed to cause Ashlo to cease doing business with any of the 176 (petition for Writ of Certiorari, p. 33). This inference, of course, overlooks the fact that neither Sunfire nor Ashlo were among the 176 producers who had "failed to sign the contract," and therefore it would be difficult to explain why pickets were stationed at Ashlo. The obvious answer appears from the record: the pickets were at Ashlo, just as they were stationed at other tipples, for the purpose of choking off the outlet of numerous coal producers with a design to force them to sign a union contract with an organization which had not been certified as the collective bargaining agent for the employees of any of them (8a). To deny that this was "*an* objective" is to deny the only reasonable conclusion that can be reached from this record. The very contract which petitioner was sponsoring betrayed the intent (16b). As pointed out in the statement of the evidence, the pickets did not visit and station themselves at producing mines, but concentrated their activities on ramps and tipples (108a-109a). This produced results: an estimated eleven hundred coal operator signatories (225a).

In *Local 761* the Court was trying to delineate the paths to two goals having inherent elements of conflict. In that case the Court said, in substance, that peaceful picketing at the situs of a primary employer could not be condemned merely because it had the hope, motive, and objective of influencing third persons, including the employees of other employers, to respect its picket line and thereby exert pressures on the primary employer. Even

this permissive relinquishment from the literal interpretation of Section 8(b)(4)(A) was limited to those persons whose work was connected with and necessary to the regular operation of the primary employer's business. It was never suggested that pickets, at any place, could deliberately set out to enmesh other employers and employees in a quarrel not their own, and carry out that enmeshment by threats, violence, and the destruction of property. Rather than being comparable to the situation in *Local 761*, the pattern in this case was more similar to that involved in *NLRB vs. Highway Truckdrivers & Helpers, Local No. 107*, 300 F. 2d 317, where the Court of Appeals for the Third Circuit declared (pp. 321-322):

> "Compliance with these standards, however, at most gives the picketing only presumptive validity. *Local 761 International Union of Electrical Radio & Machine Workers A.F.L.-C.I.O. v. N.L.R.B.*, 366 U. S. 667, 81 S. Ct. 1285, 6 L. Ed. 2d 592 (1961). Even under that doctrine, the Union must conduct its picketing so as to minimize the impact thereof on the secondary employer. *Retail Fruit & Vegetable Clerks' Union*, 116 N. L. R. B. 856 (1956), and where, as here, the Union deliberately enmeshes secondary employers and employees in the dispute, the doctrine has no application. (Citing authorities.)
>
> "Rather than complying with the fourth requirement of the Moore Dry Dock doctrine, the union here, by deliberate acts, made it perfectly clear that the picketing was not limited to the primary employer."

In connection with picketing on the railroad, the petitioner notes with obvious satisfaction that certiorari has been granted in the case of *United Steelworkers of Amer-*

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* * * * that the picketing clearly demonstrate that the dispute was only with the primary employer."

ica vs. NLRB (*Carrier Corporation vs. NLRB*, 2 Cir., 311 F. 2d 135). Petitioner is sanguine in its anticipation of the outcome of that litigation, and joins with that petitioner in the suggestion that the "law which imposes such heavy financial liability on unions ought at least to make clear what their obligations are." It can readily be gathered that this petitioner is suggesting that the Court not only "make clear" the obligations of a union in a situation similar to that in the *Steelworkers* case, but should also "make clear" the obligations of the union in this entirely dissimilar case and, presumably "make clear" such obligations in any and every situation which imposes heavy financial liability on unions. If this is to be the rule, then there seems to be no logical reason why the Court should not also make clear the obligations of other associations, organizations and even individuals in every instance wherein heavy financial liability is imposed upon them. This seems too much to ask.

Petitioner's suggestion that there could be no secondary boycott in the present case because there was no neutral employer is also difficult to reconcile with the record. Under a statute where "*an* objective" is the test, coal producers were neutrals insofar as the union was trying to force respondents into a contract. Ashlo and Sunfire were certainly neutral insofar as the petitioner was trying to organize 176 (or 1100) other employers, unless it can be said that everyone doing any business with the primary employer is non-neutral. The railroad was neutral, unless it can be said that its interest in shipping Ashlo's coal removed it from that category. The truckers were undoubtedly neutral. Charlie Campbell, for instance, was an independent truck operator who had three trucks and employed two drivers (87a). Neither of the respondents had any control over his business whatever (20a, 42a, 88a).

If he, too, was an object of the union's organizing campaign, the technique of its persuasion—opprobrious names and threats of murder—was most peculiar and unorthodox. With respect to the truckers in general, pickets assured Ashlo's manager that if he did not close the tipple down "* * * we will stop the trucks out at the bridge, and if you don't get any coal, I guess you will close it down" (36a-37a).

Though several truckers appeared as witnesses on the trial, not one indicated that he had ever been solicited to sign a contract with the union. Surely it cannot be denied that the truckers were neutrals unless it be argued (as petitioner sometimes does) that the mere fact the truckers were doing business with a producer furnishing coal to Ashlo removed them from the neutral realm. This argument, of course, is not tenable because if everyone who did business with an employer is classified non-neutral, then the language in the Act "to cease doing business with any other person" would be meaningless.

It was respondents' feeling at the time of the trial not only that there was evidence to support a finding that the petitioner had engaged in a secondary boycott, but rather that the evidence affirmatively and positively showed such a boycott, in consequence of which the respondents offered a peremptory instruction on this phase of the case (27b). Respondents are of the same opinion still.

QUESTION NO. 1

(b)

Should the Court see fit to review the evidence in this case, that evidence will demonstrate that there was sufficient instigation and authorization of those acting for petitioner to make the petitioner responsible for the damage to respondents' property and businesses.

Petitioner again contends in this case, as it has in other similar cases, that it cannot be held responsible for the damage to respondents' businesses and properties because there was no positive and undisputed identification of the individuals who burned the tipple, nor any positive and undisputed proof of their authority to act on behalf the Union in doing so.

This, again, calls for review of the evidence by this Court.

A more direct delegation of authority and chain of command could hardly be found. It is not denied that the International Union appointed Carson Hibbetts to head District 30 and the organizing campaign which began there in early 1959 (219a, 14b). It is also admitted that he delegated to Matt Combs and Bill Perkins the authority to handle the picketing (224a, 14b). These men traveled over a wide area (308a) but at Combs they charged John Stubblefield and Steve Fields with the responsibility of being in charge of the pickets there (309a). These sub-lieutenants were said to have been there with regularity (309a). Hundreds of aggressive pickets, of whom James Morris, Jasper (or Lonnie) Wright, Clinton Bryant, and Walter Turner were typical (59a, 64a, 72a, 75a, 89a-90a, 95a, 100a, 173a, 183a, 185a) were the privates and army regulars in this campaign.

It would be absurd to contend that James Morris was not strongly implicated in the evidence as being one

of the participants in the burning of the tipple. He practically told Ruby Baker as much (204a, et seq.). He was missing on the night of the fire (204a), and claimed to have been at his home (289a). That home, incidentally, was near the tipple and between it and the police whom petitioner stresses as having been stationed at the bridge (79a).

Apparently conscious of the frailty of its contention that there was no proof linking Morris to this fire, petitioner asserts that, even if Morris burned the tipple, there was nothing to impute his lawlessness to UMW. This overlooks many pertinent facts. Morris was repeatedly active with the pickets (59a, 64a, 72a, 75a, 89a, 95a, 173a). He was a member of the union (290a), and receiving benefits from it (288a-289a). His duly authorized leader, Bill Perkins, was often present when disorders were in progress, and his cooperation with police was nil (27a, 89a, 112a, 152a, 159a, 169a, 216a). Morris' activities were not of a local and personal nature. At 2:45 in the morning he was several miles away from Combs in a truck with Walter Turner, "fishing," but riding in a vehicle that had considerable ammunition but no fishing tackle (80a, 21b). This same Walter Turner was the person who threatened at Combs that truck drivers would be shot if they continued to haul coal (89a-90a). As early as March 31, mobs of pickets at the Sunfire tipple were howling "burn it down" (168a). The day before the tipple burned, pickets threatening a truck driver cried out "Go ahead and let him dump, he won't be hauling there long" (96a). Also the day before the tipple burned, the duly commissioned and subsequently appreciated* Bill Perkins told one of his

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* Subsequent to his good services, Mr. Perkins was made International Representative of UMW (221a) after pleading guilty to violation of the court's injunction proscribing certain behavior during the strike, and after serving a term in jail for that offense (238a).

pickets that it would not be necessary to report for picket duty at the Sunfire tipple any more because "They would take care" of it (216a-217a).

Also it is quite possible that the jury might have considered as more than merely coincidental the fact that during this same "organizing" campaign, conducted by the same leaders of respondents' organization, Roland Price suffered the burning of a scale house at one location, and a tipple at another (122a); Kermit Campbell had a locomotive and light house "blowed up" (124a); London Sexton "had three tipples to be blowed up" (125a); Marion Ritchie lost three tipples by fire and explosion (126a); Dick Johnson had his mining equipment "blown up" (130a); Stamper Collins had a large auger "dynamited" (134a); Jack Blair had all of his deep mining equipment blown up (138a); the railroad line leading to the tipple of Virginia Collins was dynamited seven times (139a); and Bill Farley, though operating a union mine, nevertheless had pickets and his "auger got blowed up in May" (140a). One would hardly describe as reckless the statement of Sergeant Willard Mitchell that this period was "extraordinary" (109a).

While this eventful campaign was under way, and being supported by the petitioner to the tune of well over a million dollars in a period of less than four months (14b-15b), the district court found it necessary to issue two injunctions enjoining good behavior upon the petitioner and its members (8b-9b, 239a-241a), the State Police found it necessary to increase their forces in the area from the customary 11 men to a total of 136 (105a-106a), and the Governor considered the situation sufficiently serious to send the National Guard into the district (114a).

Finally, it is worth noting that the very highest officials of UMW callously declared that the way to stop the violence was to "sign the contract" (47a, 127a, 128a, 130a, 131a, 135a).

From all of this, it was certainly reasonable for a jury to conclude that the mischief done by Morris and his unidentified companions was done with a definite prescience on the part of the petitioner's duly delegated agents, and with the express or tacit consent and approval of the petitioner.

In *Delaney v. United States*, 263 U. S. 586, this Court was dealing with a man's liberty, surely as important as the rights of the petitioner in this litigation. It was there said (pp. 589-590):

> "Petitioner attacks the judgment as not being supported by the testimony, a great deal of which is detailed. The immediate reply is that the probative sufficiency of the testimony has the support of the District Court (in which is included the verdict of the jury) and of the Circuit Court of Appeals. It would take something more than ingenious criticism to bring even into question that concurrence or to detract from its assuring strength—something more than this record presents."

To like effect is the Court's statement in *United States v. Johnson*, 319 U. S. 503, 517-518.

QUESTION NO. 2.

Petitioner failed to comply with Rules 51 and 49(a), Federal Rules of Civil Procedure, in such manner as to preserve its right to complain of instructions given, or refused to be given, or of submitted interrogatories, although had proper objection been taekn, complaint of petitioner on this ground is without merit.

Under Subdivision IV of its Reasons for Granting the Writ, the petitioner complains of error with regard to Interrogatory 1, as given by the trial court, and as to the trial court's refusal to give its offered Instructions 3, 4 and 5. In this regard, the Court of Appeals reached the following conclusion (A5):

> "While we feel that the charge of the trial court to the jury was without prejudicial error, on the present record it is unnecessary to pass upon that question, or to consider the propriety of the trial court's rulings on interrogatory 1 and its refusal to give certain instructions requested by defendant. Rule 51, F. R. Civ. P., precludes a party from assigning as error the giving or failure to give an instruction to the jury unless he has objected thereto before the jury retired to consider its verdict, 'stating distinctly the matter to which he objects *and the grounds of his objection.*' (Emphasis supplied.) Not having stated such grounds, defendant may not now be heard to complain. Palmer v. Hoffman, 318 U. S. 109, 119, 63 S. Ct. 477, 483 (1943); McPherson v. Hoffman, 275 F. 2d 466 (6 C. A., 1960)."

In undertaking to contradict the Court of Appeals on this point, the petitioner refers to these specific record citations: "333-36a, 337a, 348a-9a" (Petition, 46). The first citation (333-36a) refers merely to the group of instructions which were offered by the petitioner. The second citation (337a) refers to the following statement:

(337a) "Mr. Combs: For the record, Your Honor, we object to the Interrogatory No. 1 to be answered by the Jury and say for reasons that it does not correctly state the law concerning the violation of the Statute or the evidence offered by the plaintiffs. We think that the Court should have given Instruction No. 3 offered by the defendant as a correct statement of the law."

The third citation (348-9a) refers to the following statements:

(348a) "The Court erred in its Instruction with reference to the secondary boycott provision, as sued upon in the complaint; in that the Court did not define boycott in the terms of the Statute, that is, Section 303 of the Labor-Management Relations Act of 1947; and the Court erred in refusing to give Instruction No. 3 with reference to the boycott as tendered by the defendant."

(349a) "The defendant renews its objection to the proposed interrogatories to be answered by the Jury on the same grounds and for the same reasons heretofore given.

"The Court erred in its refusal to give Defendant's requested Instructions numbered 4, 5, 6 and 7.

"The defendant renews its objection to the failure of the Court to give these Instructions on the same grounds and for the same reasons heretofore given to the Court."

No other objections appear in the record as to Interrogatory 1, or as to refused Instructions 3, 4 and 5.

Rule 51 of the Federal Rules of Civil Procedure, Title 28, U. S. C. A., provides that "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

Rule 49(a) of the Federal Rules of Civil Procedure, Title 28, U. S. C. A., permits the court to require a jury to return specific verdicts upon each issue of fact. These questions are to be submitted to the jury in written form, susceptible to brief answers. The rule provides that

> "If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict."

It is submitted that the exceptions taken by the petitioner do not sufficiently comply with the provisions of Rule 51 and of Rule 49(a) so as to permit review of the errors alleged regarding the instructions and the interrogatories, and that the Court of Appeals correctly so held.

In applying the provisions of Rule 51 in the case of *Palmer v. Hoffman*, 318 U. S. 109, 119, 63 S. Ct. 477, 483, 87 L. Ed. 645, this Court stated:

> "In fairness to the trial court and to the parties, objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error. Where a party might have obtained the correct charge by specifically calling the attention of the trial court to the error and where part of the charge was correct, he may not through a general exception obtain a new trial."

In the case of *Detroit Edison Company v. Striker*, 6 Cir., 65 F. 2d 126, counsel objected to the court's instructions as follows:

> "Our exceptions would be the refusal of the court to give our requests, and each and all of them, and the

portions of the charge insofar as inconsistent with the request."

In holding such objection insufficient, the court stated (p. 127):

> "It is the settled rule in the federal court established by a long line of cases, that general exceptions of the character of the ones here taken cannot be regarded as directing the mind of the court to any specific alleged error, and do not save any questions for review. (Citation of authority.) The failure of counsel to point out to the court in what respect the general charge failed to include the applicable law requested to be given to the jury, and to indicate specifically wherein it was inconsistent therewith, constrains us to refuse now to consider the errors complained of."

See also *Richfield Oil Corporation v. Karseal Corporation*, 9 Cir., 271 F. 2d 709, 721, 722; *Apperwhite v. Illinois Central Railroad Company*, 8 Cir., 239 F. 2d 306, 310; *Johnson v. Chesapeake and Ohio Railway Company*, 7 Cir., 227 F. 2d 858, 861; and *Hansen v. St. Joseph Fuel Oil & Manufacturing Co.*, 8 Cir., 181 F. 2d 880, 886.

In applying the mandate of Rule 49(a), the courts have consistently held that a party waives his right to require the presentation of any other issue of fact not included in the special interrogatories submitted by the trial court by failing to make demand that such other issue of fact be submitted. *Columbia Horse & Mule Commission Co. v. American Insurance Co.*, 6 Cir., 173 F. 2d 773, 774, 775; *Merrill v. Beaute Vues Corporation*, 10 Cir., 235 F. 2d 893, 897; and *Ribeiro v. United Fruit Co.*, 2 Cir., 284 F. 2d 317, 319.

With regard to exceptions taken to the form of a special interrogatory, the courts hold that Rule 51 applies, and that the objections made must specifically call the attention of the trial court to the error claimed. *Penn v.*

Glenn, 6 Cir., 265 F. 2d 911, 912; *Martin v. United Fruit Co.*, 2 Cir., 272 F. 2d 347, 348, 349; and *Filipek v. Moore-McCormack Lines, Inc.*, 2 Cir., 258 F. 2d 734, 736, cert. denied 359 U. S. 927, 79 S. Ct. 605, 3 L. Ed. 2d 629.

While it is the position of the respondents that by reason of the failure of the petitioner to comply with the requirements of Rule 51 and Rule 49(a), it cannot complain as to the instructions given or the interrogatories submitted by the trial court, or as to the failure of the trial court to give requested instructions of the petitioner, nevertheless, respondents will discuss the points raised in this regard.

While counsel for petitioner limited his objection to Interrogatory 1 at the time of the trial to the general ground that "it does not correctly state the law concerning the violation of the Statute or the evidence offered by the plaintiffs," in the petition for certiorari various new and entirely different grounds are asserted in petitioner's attack upon this interrogatory. The grounds now asserted may be summarized as follows: (1) that it is inconsistent with the complaint's allegations; (2) that it is unsupported by the evidence; (3) that it is silent concerning the factor of the "neutral employer"; (4) that it does not enlighten the jury by delineating the essential elements to a Section 303 violation in the language of the opinion in the case of *Local 761, Int. Union of Electrical Workers v. NLRB*, 366 U. S. 667; (5) that in the charge accompanying this interrogatory the trial court emphasized the element of violence and ignored some of the evidence offered by the petitioner with regard to the professed objective of its activities; and (6) that it submitted to the jury a mixed question of law and fact.

At this point it is appropriate to note the well-established rule that an objection raised in the appellate court

on an instruction differing from that raised in the trial court is not properly before the appellate court for its consideration. *Siegfried v. Kansas City Star Company*, 8 Cir., 298 F. 2d 1, 7, *Solomon Dehydrating Co. v. Guyton*, 8 Cir., 294 F. 2d 439, 445; and *Chaney v. Slone*, Ky., 345 S. W. 2d 484, 486.

Rule 49(a) provides that where written questions are submitted to the jury for the return of a special verdict "The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue." In considering the correctness of an interrogatory submitted hereunder, the rule pertaining to instructions generally is applicable, that is, that the interrogatory is not to be read apart from the instructions as a whole, but is to be considered from the point of view of the impression it would seem to convey to a jury of laymen in the context of the entire charge. *L'Urbaine Et La Seine v. Rodriguez*, 5 Cir., 268 F. 2d 1, 5; *Southern Railway Company v. Jones*, 6 Cir., 228 F. 2d 203, 211.

The trial court complied with the requirement of Rule 49(a) and gave a charge to the jury which instructed and enlightened them on respondents' basic cause of action; the wrongful interference with their businesses, and the supporting grounds based upon violation of the federal statute and upon violation of the common law of Kentucky, as well as upon the issue of damages. The court then, in further compliance with the rule, reduced the factual issues to questions, simple in form, in terms readily comprehensible to the jury.

Petitioner complains of the use of the phrase "to join the Union," saying that this phrase should be "to sign the contract with the Union;" however, it proposes that this phrase be considered only in the context of Interrogatory

1 and not in the context of the court's entire charge. This argument is similar to the one made in the case of *L'Urbaine Et La Seine v. Rodriguez*, 5 Cir., 268 F. 2d 1, wherein one of the main issues of fact was whether one of the defendants was an independent contractor or was an employee of his co-defendant. In submitting interrogatories to the jury, the trial court spoke in the terms of "servant," and upon appeal it was urged that this was error, as the term "servant" was not the test of the independent contractor versus employee relationship. In rejecting this argument, the appellate court pointed out that you could not read the interrogatory apart from the instructions as a whole, and that when read in the context of the charge the use of this term alone was not misleading to the jury, and, to the contrary, stated that (p. 5):

> "* * *[T]he Judge, far from erring, displayed great resourcefulness in the flexible usefulness of a charge and verdict which gets the best out of a general charge and special issue verdict while overcoming or minimizing the shortcomings of each when used alone."

When Interrogatory 1 is considered in the context of the whole charge, it is apparent that the phrase "to join the Union" and the phrase "to sign the contract" were used interchangeably and were meant by the court, and understood by the jury to mean, to induce or compel the respondent companies to become union operations. In his charge the trial court refers to the purpose of the claimed inducement being "with the object of forcing these plaintiffs to join the union," then in a continuation of this part of the charge stated (338a, 339a):

> "The plaintiffs further say that they not only undertook to persuade or to encourage the truckers to quit supplying them, *but that for the same purpose, forc-*

> *ing them to sign this contract*, that they felt and told the defendants in their meeting that they couldn't live under, that the small coal operators who sold them the coal couldn't live under; that it required these defendants to buy coal only from operators who operated in accordance with the terms of this contract; that they couldn't pay forty cents a ton to the Welfare Fund in addition to their other expenses." (Emphasis added.)

Respondents find it hard to apprehend that it can be seriously argued that the jury might have been misled by this interrogatory into believing that it was necessary for them to determine whether the union was engaged in signing up employer-corporations to its membership. However, this is what the petitioner urges here, and says further that there is no evidence to support the proposition that the union was engaged in such activity. It is submitted that this argument is without merit.

Mingled with the attack on Interrogatory 1 is the argument that the trial court should have given petitioner's Instruction 3. While counsel for petitioner took only a general exception to the court's refusal to give this instruction, it is now urged that it should have been given to enlighten the jury on the necessity of a "neutral employer" being involved in the labor dispute, and to further enlighten the jury by delineating the essential elements to a Section 303 violation consistent with the language of the opinion in the *Local 761* case. Petitioner maintains that the trial court was required to use technical language or "language of the statute" in instructing the jury concerning a Section 303 violation. To the contrary, the law is that such practice is not to be commended. *LaPresti v. Goodall Oil Co.*, 7 Cir., 290 F. 2d 653, 655; *Moore v. Louisville & Nashville Railroad Company*, 5 Cir.,

223 F. 2d 214, 217. The rule for testing the correctness of an instruction is well-stated in the case of *Government Employees Insurance Co. v. Davis*, 5 Cir., 266 F. 2d 760, at page 765:

> "The test for the correctness of an instruction does not lie in the indulgence which a lawyer in his office with the aid of his books, or the trial and appellate courts with the benefit of briefs and arguments of counsel, give to instructions, but as to how the instructions will naturally be understood by the average men composing juries."

And again, by Judge Wyzanski, in the case of *Cape Cod Food Products, Inc., v. National Cranberry Association*, D. C. D. Mass., 119 F. Supp. 900, at page 907:

> "[T]he object of a charge to a jury is not to satisfy an appellate court that you have repeated the right rigmarole of words, but to try to make jurors who are laymen understand what you are talking about."

When this test is applied to the charge of the trial court, it is at once demonstrated that the jury of laymen were told, in language that they could understand, the factors involved in this action for damages for the wrongful interference by the petitioner with the businesses of the respondents, both as to the federal ground and as to the common law ground.

A reading of Instruction 3 offered by the petitioner, and properly refused by the trial court, and a consideration of petitioner's argument that violence is immaterial in seeking to accomplish its professed objective, indicate that the petitioner is insisting upon trying this case under the theory that it must stand or fall upon the point of whether or not, under the particular facts, petitioner violated the secondary boycott provisions of Section 303. This

has been unsuccessfully urged by it in the *Meadow Creek** case, the *Osborne*** case, the *Gilchrist* case and the *Flame* case.

The last challenge made against Interrogatory 1 is that "it submitted to the jury a mixed question of law and fact"; however, in what respect this is so is not pointed out in the petition. A reading of the interrogatory shows that there is no basis for this argument.

Although failing to indicate to the trial court the grounds for objecting to its refusal to give petitioner's instructions 4 and 5, complaint is now made of its refusal to give these instructions.

Instruction 4 offered by the petitioner covered the subject of the right of the union to picket the businesses of the respondents, to organize their employees and to induce them to strike, even though these activities interfered with respondents' operations and businesses. The trouble with this instruction was that it placed no limitation upon these rights, and under it mass picketing, intimidation and violence, the destruction of property and the like, all contrary to the applicable law, would have been condoned.

The trial court did cover in its charge the right of the union by means of strikes and picketing to promote fair collective bargaining, and stated that strikes and picketing were important, lawful devices for laborers to put forth their claims and to express their grievances (346a). So much of the substance of Instruction 4 as petitioner was entitled to was fairly and correctly covered by the charge

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* *United Mine Workers v. Meadow Creek Coal Co.*, 6 Cir., 263 F. 2d 52, cert. den. 359 U. S. 1013.

** *United Mine Workers v. Osborne Mining Co.*, 6 Cir., 279 F. 2d 716, cert. den. 364 U. S. 881.

of the court, and the petitioner has no valid complaint in this regard. *Gerhart v. Henry Disston & Sons, Inc.*, 3 Cir., 290 F. 2d 778, 795; *Thiringer v. Barlow*, 10 Cir., 205 F. 2d 476, 477.

Petitioner's insistence that it was entitled to have the substance of its Instruction 5, relating to the immateriality of evidence of violence, covered by the charge of the trial court cannot be sustained in view of the nature of the cause of action and the dual grounds supporting it *United Construction Workers v. Laburnum Construction Corporation*, 347 U. S. 656, 665, 666; and *International Union, U. A., A. & A. I. W. v. Russell*, 356 U. S. 634, 645.

QUESTION NO. 3.

Determination by district and appellate courts that Sunfire was entitled to maintain an action under Section 303 of the Act is correct.

In a brief paragraph under subdivision V of its Reasons for Granting the Writ, the petitioner asserts that the Court of Appeals, in sustaining the Sunfire judgment, failed to follow its own decision in the case of *United Mine Workers of America v. Osborne Mining Company*, 279 F. 2d 716, and, therefore, this conflict between these two opinions of the Sixth Circuit requires the granting of the petition for certiorari. On this point, the Court of Appeals had this to say (A5):

> "In a case where one entity acted merely as sales agent for another, it was held that the principal was without a federally recognized cause of action in *United Mine Workers of America v. Osborne Mining Company*, supra. Defendant relies on that case in arguing that as Ashlo's principal agent Sunfire can not be awarded judgment. This argument is completely untenable because no such agency relationship is disclosed by the record."

That the Court of Appeals was correct in this assertion is obvious. In the first place, Sunfire was not a sales agency selling the coal of Ashlo on a commission basis. Sunfire was the owner of the coal processing plant, including the tipple which was destroyed by fire and the coal washer and storage bin which were damaged by dynamite, and had leased it to Ashlo upon a rental basis of 25 cents for each ton of coal processed (49a-51a). While there was no obligation for it to do so under the lease (49a-51a), to increase the amount of rental income which it was being paid by Ashlo, Sunfire took over responsibility for the sale of Ashlo's coal (40a, 56a). The uncontradicted proof is that Sunfire received no compensation from Ashlo for this assistance in the sale of the coal; that Sunfire only received the 25 cents per ton rental provided for by the lease (52a). It is also uncontradicted that, in addition to its officers, its assistant manager and its bookkeeper, Sunfire had as its employees an engineer and some construction men, (41a), and that Sunfire was one of the companies which the union was trying to get to sign the new contract (46a).

Should a conflict between two opinions in the same circuit be a ground for granting certiorari, it is evident that there is none whatever in the opinion of the Sixth Circuit in this case and its opinion in the *Osborne* case.

QUESTION NO. 4.

Doctrine of ancillary or pendent jurisdiction as followed by lower courts is supported by applicable decisions of this Court.

Petitioner denies the jurisdiction of the district court to entertain a case where a claim under Section 303 of the Labor Management Relations Act of 1947 (29 U. S. C. A. 187) is joined with a non-federal common law action for tort, saying that the rule of ancillary or pendent jurisdiction is inapplicable because, (1) if the common law ground was tried alone as an independent cause of action in a State court, it would take, in this particular instance, the procedural form of a class suit rather than a suit against a jural entity, and (2) it is precluded by the doctrine of federal preemption.

Basically, this is the same question which has been considered and disposed of, contrary to petitioner's contention, in the cases of *United Mine Workers v. Meadow Creek Coal Co.*, 263 F. 2d 52 (C. A. 6, 1959), cert. denied 359 U. S. 1013; *United Mine Workers of America v. Osborne Mining Company*, 279 F. 2d 716 (C. A. 6, 1960), cert. denied 364 U. S. 881; *Gilchrist v. United Mine Workers of America*, 290 F. 2d 36 (C. A. 6, 1961), cert. denied 368 U. S. 875.

Specifically, this is the same question, in exactly the same language, as was raised by this same petitioner in its petition for certiorari in the case of *Flame Coal Company v. United Mine Workers of America*, 303 F. 2d 39 (C. A. 6, 1962), cert. denied 371 U. S. 891. The same argument as was made in its petition for certiorari in the *Flame* case is again made by the petitioner in this case. As in the brief in opposition in that case, the following argument is made by way of response.

While petitioner seeks to persuade the Court that the requirement in Kentucky state courts that a union, or other voluntary association, be proceeded against in a class action, rather than sued as a jural entity, is a matter of substance, as distinguished from a procedural matter concerning merely the manner and the means by which a right to recover is enforced, this argument is not supported by the law of Kentucky.

Voluntary unincorporated associations are considered legal entities in Kentucky. In *International Union of Operating Engineers v. Bryan*, Ky., 255 S. W. 2d 471, 474, the Court stated:

> "The distinction between an unincorporated labor union and a corporation is apparent. Although regarded as a legal entity, an unincorporated union is a voluntary association which is not distinct from its individual members, as a corporation from its stockholders."

That the bringing of suit against a voluntary association in Kentucky by class action is merely procedural is demonstrated by the following rulings of the Court of Appeals of Kentucky. In *U. M. W. A. v. Comer*, 159 Ky. 605, 167 S. W. 891, this same petitioner was held responsible for damages arising out of libel, and its argument that it was immune to suit was disregarded in view of the fact that it took no steps to raise a question as to the procedural form of action by which it was brought into court. The same result was reached by the Court in the case of *Hotel, Restaurant & Soda Fountain Employees Local Union No. 181 v. Miller*, 272 Ky. 466, 114 S. W. 2d 501.

In the *Flame* opinion, the Court of Appeals specifically ruled upon this question, making this conclusion (303 F. 2d 39, 42):

"Defendant denies the jurisdiction of the district court to entertain a case where a claim under Section 303 of the Labor Management Relations Act of 1947 (29 U.S.C.A. § 187) is joined with a non-federal common law action for tort.

"This contention has been considered and disposed of, contrary to defendant's contention, in the cases of United Mine Workers of America v. Meadow Creek Coal Co., 263 F. 2d 52 (C. A. 6, 1959), cert. denied 359 U. S. 1013, 79 S. Ct. 1149, 3 L. Ed. 2d 1038; United Mine Workers of America v. Osborne Mining Company, 279 F. 2d 716 (C. A. 6, 1960) cert. denied 364 U. S. 881, 81 S. Ct. 169, 5 L. Ed. 2d 103; Gilchrist v. United Mine Workers of America, 290 F. 2d 36 (C. A. 6, 1961), cert. denied 368 U. S. 875, 82 S. Ct. 120, 7 L. Ed. 2d 76. In Meadow Creek, Judge Martin of this court quoted the district court's conclusion that, 'the claim of secondary boycott and unlawful conspiracy are not separate causes of action, but are merely different grounds to support a single cause of action, the cause of action being the violation by the defendant of the plaintiff's right to be free from wrongful interference with its business.' Citing Hurn v. Oursler, 289 U. S. 238, 53 Ct. 586, 77 L. Ed. 1148, he sustained the district court's retention of jurisdiction to dispose of the entire cause of action.

"A different phase of defendant's attack upon the district court's jurisdiction is its argument that defendant, a voluntary unincorporated association, is not considered, in Kentucky, a jural entity subject to suit, and there being no diversity of citizenship between plaintiff and the officers and members of the union, jurisdiction in the federal court could not attach as to the common law action. However, federal jurisdiction attached here because of the secondary boycott and under Rule 17 (b) F. R. Civ. P. 28 U. S. C. A. defendant, an unincorporated association, is suable as such and in the federal court may be made to respond in

damages for its tortious conduct (29 U. S. C. A. § 187). Gilchrist v. United Mine Workers of America, supra (290 F. 2d 39); United Mine Workers of America v. Osborne, supra (279 F. 2d 716)."

Rather than being "a federal question important in the construction and administration of the Act's Section 303," as averred in the petition (p. 48), it is submitted that this is merely a procedural question which under all applicable law is controlled by Rule 17 (b) (1), Federal Rules of Civil Procedure.

But, in addition to the attack on the jurisdiction of the District Court based upon the procedural law of Kentucky, in support of the basic question of the applicability of ancillary or pendent jurisdiction in an action under Section 303, Labor Management Relations Act, petitioner asserts that such jurisdiction is precluded by the doctrine of "federal preemption," and that the ruling of the District Court and the ruling of the Court of Appeals to the contrary is a departure from the decisions of this Court.

In applying the doctrine of ancillary or pendent jurisdiction, the party against whom it is invoked usually makes the contention that his type of action should be an exception to the rule. The Court gives full answer to this argument in the case of *Hurn v. Oursler*, 289 U. S. 238, in response to the question of whether cases involving patents, trademarks and copyrights constitute an exception to the general rule, as follows (p. 245):

"The Siler and like cases announce the rule broadly without qualification; and we perceive no sufficient reason for the exception suggested. It is stated in these decisions as a rule of general application, and we hold it to be such—as controlling in patent, trademark and copyright cases as it was in the cases where it is announced."

Applicable to this case, as in the *Osborne* case, the *Gilchrist* case, and the *Flame* case, is the quotation from *Errion v. Connell*, 9 Cir., 236 Fed. 2d 447, 454:

> "It is alleged in the complaint in our case, and the trial court found, a *single cause of action* involving a *single fraudulent scheme* to defraud Mrs. Connell of her property. There were involved two types of property, one being securities over which the Federal Court had jurisdiction, and the other non-securities over which the Federal Court normally has no jurisdiction. But the single fraudulent scheme arising out of the same set of facts encompassed both types of property. The thought of requiring two lawsuits in this situation is untenable. We, therefore, hold that the trial court could correctly award damages for the entire fraudulent scheme, even though non-securities were involved."

Petitioner's argument that the application of the rule of ancillary or pendent jurisdiction as expressed in the case of *Hurn v. Oursler* conflicts with the decisions of this Court because of the doctrine of federal preemption is without merit. This specific question has been considered by the Court and has been disposed of, contrary to petitioner's contention, in the cases of *United Construction Workers v. Laburnum Construction Corporation*, 347 U. S. 656, and *International Union, U. A., A. & A. I. W. v. Russell*, 356 U. S. 634.

In *Laburnum*, in dealing with the doctrine of federal preemption, and speaking of the federal statute which is before the Court in this action, it was said (p. 666):

> "To recover damages under that section is consistent with the existence of jurisdiction in state courts to enforce criminal penalties and common-law liabilities generally. On the other hand, it is not consistent to say that Congress in that section, authorizes court

action for the recovery of damages caused by tortious conduct related to secondary boycotts and yet without express mention of it, Congress abolishes all common-law rights to recover damages caused more directly and flagrantly through such conduct as is before us."

In *International Union, etc., v. Russell*, 356 U. S. 634, a union and its agent were sued in a state court for malicious interference with an employee's lawful occupation. It was contended that the alleged wrongful acts constituted unfair labor practices under the Labor Management Relations Act 1947, and that there was such federal preemption in this area of legislation as to deprive the state court of jurisdiction. This Court referred to its holding in the *Laburnum* case, and to the contention immediately before it saying (pages 641-642):

"This case is similar to Laburnum in many respects. In each, a state court awarded compensatory and punitive damages against a union for conduct which was a tort and also assumed to be an unfair labor practice. The situations are comparable except that, in the instant case, the Board is authorized, under § 10(c) of the Federal Act, to award back pay to employees under certain circumstances. We assume, for the purpose of argument, that the Board would have had authority to award back pay to Russell. Petitioners assert that the possibility of partial relief distinguishes the instant case from Laburnum. It is our view that Congress has not made such a distinction and that it has not, in either case, deprived a victim of the kind of conduct here involved of common-law rights of action for all damages suffered."

And again, on page 645 of the opinion, the Court stated:

"If the employee's common-law rights of action against a union tortfeasor are to be cut off, that would in effect

grant to unions a substantial immunity from the consequences of mass picketing or coercion such as was employed during the strike in the present case."

In the case of *San Diego Building Trades Council v. Garmon*, 359 U. S. 236, this Court distinguished its holding there from its rulings in *Laburnum* and in *United Auto Workers v. Russell*, stating that in those cases "* * * we have allowed the States to grant compensation for the consequences, as defined by the traditional law of torts, of conduct marked by violence and imminent threats to the public order." (p. 247.) Here, as in *Laburnum* and *Russell*, the activities of the petitioner were marked with mass picketing, dynamiting, shooting, violence and intimidation. The type of conduct which made the doctrine of federal preemption inapplicable in those cases also makes that doctrine inapplicable in the instant case.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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